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In the Supreme Court of the United States

OCTOBER TERM, 1992

DICKSON WELDING, INC.,
Petitioner,

vs.

ALEXANDER & ALEXANDER, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in dismissing a defendant's claim against a third party defendant for the defendant's failure to file a cross appeal where the jury below rendered a verdict in favor of the defendant on the principal claim, where there was no adjudication of the third party claim, and where the third party claim was dismissed by the trial court as moot?

2. Does this Court's holding in *Torres*, that compliance with Fed. R. App. P. 3(c) is a jurisdictional prerequisite, apply to cross appeals under Fed. R. App. P. 4(a)(3), which has been considered a rule of practice?

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In the Supreme Court

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October Term, 1992

Dickson Welding, Inc.,
Petitioner,

vs.

Alexander & Alexander, Inc.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals, which is reported, appears in Appendix A.

JURISDICTION

The Fifth Circuit entered its opinion and judgment on May 11, 1992. Petitioner filed its Petition for Writ of Certiorari within ninety days of the Notice of Entry of Judgment. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the following pertinent statutory provisions are set forth in Appendix B infra:

Fed. R. App. P. 1

Fed. R. App. P. 3(c)

Fed. R. App. P. 4(a)(1)

Fed. R. App. P. 4(a)(3)

28 U.S.C. §1291

28 U.S.C. §2106

STATEMENT OF THE CASE

Dickson Welding, Inc. ("Dickson") which had been insured by Transit Casualty Company ("Transit") was sued for additional premiums allegedly due under two Transit policies by the receiver for Transit which had become insolvent.[1] Dickson denied the claim asserting several defenses, and alternatively impleaded its agent, Alexander & Alexander (A&A). Following a jury trial of the matter, the jury rendered a verdict on special interrogatories in favor of Dickson on the main demand, and never decided Dickson's third party claim against A&A.

The trial court entered a judgment in favor of

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[1] Mr. Lewis Crist as receiver for Transit brought this action as plaintiff against Dickson. This writ application involves solely a dispute between Dickson and its third party defendant, A&A. Therefore, Plaintiff, Crist is not before this Court.

Dickson on the main demand in keeping with the jury's verdict and, as a matter of judicial housekeeping, dismissed Dickson's third party claim against A&A.[2] Not surprisingly, all parties operated under the notion that the dismissal of the third party claim against A&A was without prejudice and could be reurged should the Plaintiff prevail in its appeal on the merits. A&A sought and obtained approval from the Court of Appeals to submit its brief after Dickson had filed its brief.

A&A subsequently changed its position and filed a motion to dismiss Dickson's third party claim, asserting Dickson's failure to file a notice of cross appeal as the basis for such relief. The Court of Appeals ultimately granted A&A's motion, and in so doing, incorrectly interpreted the jurisprudence and policies underlying Fed. R. App. P. 4(a)(3).

The ruling by the Fifth Circuit Court of Appeals on A&A's motion highlights the uncertainty in the courts as to the application of Rule 4(a)(3) as a rule of practice versus a rule of jurisdiction. Several circuits have grappled with this issue, with conflicting results. Until this Court clarifies the application of Rule 4(a)(3), parties such as Dickson will be left in a quandary as to their rights.

Dickson submits that its failure to file a notice of cross appeal pursuant to Rule 4(a)(3) does not warrant the dismissal of its third party claim. Under the circumstances of this case, it was not necessary, nor required that Dickson file such an appeal. To hold otherwise will create an anomaly in the law not contemplated by the rules of appellate procedure.

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[2] A&A had also filed a third party claim which was likewise dismissed.

ARGUMENT

I.

SUMMARY OF ARGUMENT

Fed. R. App. P. 4(a)(3) has, until recently, been interpreted as a rule of practice subject to waiver in certain circumstances. The reasoning behind this line of cases, which began as early as 1931 in *Langnes v. Green*, 282 U.S. 531, 51 S. Ct. 243, 75 L. Ed. 502 (1931), is that once an initial appeal has been filed in a matter, the court's jurisdiction extends to the entire judgment appealed from, in effect reviving all issues encompassed in that judgment, notwithstanding the absence of a cross appeal. As such, rules requiring separate appeals by other parties are rules of practice, which may be waived in the interest of justice when circumstances so require. Following announcement of this rule, courts subsequently refined this concept of a "practice" approach, carving out equitable exceptions where appeals pursuant to Rule 4(a)(3) were not mandatory.

Dickson fits squarely within one of these exceptions, thereby alleviating the need to file an appeal from the dismissal of its third party claim. Specifically, Dickson was fully satisfied with the jury verdict rendered in its favor as to the principal claim, making an appeal by Dickson wholly unnecessary. Under the existing jurisprudence, parties are not required to file a Rule 4(a)(3) appeal when a decision is not considered "adverse" to that party. Moreover, Plaintiff's initial appeal operated to revive all issues raised in the trial court's decision, including the dismissal of A&A from the action.

Simply put, an appellee may, without taking a cross appeal, urge in support of a decree any matter appearing in

the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matters overlooked or ignored by it. This doctrine, which was first recognized by this Court in *Langnes, supra*, has consistently applied until recently. As of late, some circuit courts have cast uncertainty upon this rule of practice approach by extending the holding of *Torres v. Oakland Scavenger Co., infra*, — that Rule (3)(c) is a jurisdictional prerequisite — to Rule 4(a)(3) appeals. Such an extension has created chaos in the appellate process and has produced an anomaly in the application of the federal rules of appellate procedure.

Dickson urges that the rule of practice approach is appropriate for Rule 4(a)(3) appeals. Courts must not be hindered in the exercise of their discretionary power to retain all parties in a lawsuit on appeal in order to insure equitable resolution of the issues. To do so would be to rely on form at the expense of substance. If the rule of practice approach is not applied to the instant case, and others like it, a subversion of justice will ensue, thwarting the appellate process.

II.

Dickson, As The Prevailing Party At Trial, Was Not Required To File A Notice Of Cross Appeal From The Dismissal Of Its Third Party Claim Because Dickson Was Fully Satisfied With The Jury Verdict And The Third Party Dismissal Was Obtained Solely As A Result Of That Favorable Verdict.

Dickson submits that there was no necessity for it to file a cross appeal as it prevailed at the trial level on the principal claim. As noted above, the jury never decided the issue of Dickson's claim against A&A and that claim was

dismissed as moot. In *Langnes v. Green*, 282 U.S. 531, 51 S. Ct. 243, 75 L. Ed. 502 (1931), as reaffirmed in *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 57 S. Ct. 325, 81 L. Ed. 593 (1937), this Court recognized the power of an appellate court to modify a decree for the benefit of an appellee in the absence of a cross appeal:

> Without a cross appeal, an appellee may urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or insistence upon matters overlooked or ignored by it. What he may not do is to attack the decree with a view to enlarging his own rights thereunder, or of lessening the rights of his adversary, whether he seeks to correct an error or to supplement the decree with respect to a matter not dealt with below.

300 U.S. at 189.

Dickson does not seek to attack the decision of the district court below because it is fully satisfied with it. The district court rendered judgment in favor of Dickson and against the Plaintiff. The merits of Dickson's third party claim were never reached because they were moot. As a matter of course, therefore, the third party claim was dismissed. Nothing in the district court's decision could be considered "adverse" to Dickson, and as such, Dickson was not required to file a cross appeal. Moreover, it is questionable whether Dickson even had standing to appeal the district court's decision. As explained in *Chouinard v. Chouinard*, 568 F.2d 430, 433 (5th Cir. 1978):

> It is axiomatic that only a party aggrieved by a final judgment may appeal. If the appellee is fully satisfied with the judgment actually rendered, he need not cross appeal.

In accord with this reasoning is the judicially created rule that a party need not appeal a decision that could reasonably be read as a not being adverse to the nonappealing party. *Anthony v. Petroleum Helicopters, Inc.*, 693 F.2d 495 (5th Cir. 1982), *Bryant v. Technical Research Co.*, 654 F.2d 1337, 1342 (9th Cir. 1981). In fact, *Bryant* is a case exactly on point.

In *Bryant*, the defendant, like Dickson, was successful on the main demand so the court dismissed the defendant's third party claims as moot. The issue as framed by the court was whether the defendant's failure to file a timely protective notice of appeal required dismissal of the third party defendant. The *Bryant* court held that a protective cross appeal is only "proper procedure" and not a jurisdictional prerequisite once an initial appeal has been filed. 654 F.2d at 1341. The holding was premised on the exercise of the court's discretionary power to retain all parties in the suit to ensure equitable resolution at trial because, "to do so otherwise would be to rely on form at the expense of substance." 654 F.2d at 1342.

Significantly, one factor relied on by the *Bryant* court was that the defendant thought an appeal was unnecessary given the language of the district court's opinion, which had dismissed the third party claims as moot. "Federal courts are without power to determine the merits of moot claims." *Id.* at 1342. Similarly, Dickson, as well as A&A, thought that the district court's dismissal was without prejudice because the court never considered the merits of the indemnity claim. As such, the filing of a protective appeal was wholly unnecessary.

The reasoning in *Bryant* is sound and should be followed. To allow the dismissal of A&A to stand, due to the failure of Dickson to file a cross appeal it deemed

unnecessary, is to rely on form over substance. The result is an unintended windfall to parties like A&A, and one not contemplated by the federal appellate rules. More importantly, to rely on technical irregularities goes to the heart of upsetting the discretionary power courts possess to ensure equitable resolution of all issues in the litigation.

Kicklighter v. Nails by Janee, Inc., 616 F.2d 734 (5th Cir. 1980), further illustrates the point. There, the court allowed a defendant who failed to file a notice of appeal to benefit from a reversal brought about by a third party defendant's appeal. In *Kicklighter,* the defendant obtained a favorable judgment on its third party demand after the plaintiff had succeeded on his claim. On appeal by the third party defendant, the judgment rendered against the plaintiff was reversed.

Despite the defendant's failure to appeal, the court correctly allowed the defendant to benefit from the reversal, reasoning that the appellate process had been fully invoked and utilized. The court stated that to allow defendant's judgment on the main demand to remain intact would "violate common sense and common notions of justice." 616 F.2d at 744. Likewise, in the instant case, if the court allows A&A to be dismissed from this action due to a technical irregularity on a claim which was never litigated between the parties, justice will be thwarted. This court is compelled to reaffirm the rule of practice approach for Rule 4(a)(3) appeals, to avoid the absurd inequities that result from a rigid application of that rule.

The recent case of *U.S. v. Tabor Court Realty Corp.*, 943 F.2d 335 (3rd Cir. 1991), *cert. denied,* 112 S. Ct. 1167, 117 L. Ed. 2d 413, 60 U.S.L.W. 3542 (1992), which will be discussed at length, *infra*, in §IV, also points out the inappropriateness of applying Rule 4(a)(3) in a rigid jurisdic-

tional fashion:

> Rule 4(a)(3) is a rule of practice generally followed and not a restriction on the power of a court to see that justice is done, [citing *Langnes v. Green*, 282 U.S. 531, 51 S. Ct. 243, 75 L. Ed. 502 (1931)].

943 F.2d at 342.

Dickson submits that justice will not be done if A&A's dismissal is allowed to stand. The dismissal of Dickson's third party demand was obtained solely as a result of judicial housekeeping. The merits of the third party demand were never considered because the claim became moot. Dickson's success at trial rendered an appeal wholly unnecessary because the court's decision could not reasonably be considered "adverse" to Dickson. *Anthony v. Petroleum Helicopters, Inc., supra.*

Moreover, appellate courts are vested with discretionary power to retain all parties in the litigation to ensure equitable resolution of all issues. The instant case compels the exercise of this discretionary power to avoid an unjust and anomalous result. The jurisprudence interpreting Rule 4(a)(3) as a rule of practice is nothing short of a judicial recognition of a court's equitable discretion which may necessarily be invoked to avoid unjust results. The rule of practice approach must not be abolished. Rather, it must be applied to this case to reverse the dismissal of A&A from this action.

III.

Despite The Absence Of A Cross-Appeal, The Plaintiff's Initial Appeal Revived All Issues In The Judgment, Making A Protective Appeal Unnecessary.

Seminal to an appellate court's jurisdiction is the initial filing of an appeal. Such an appeal was taken by the Plaintiff following the district court's adverse decision, which dismissed Plaintiff's claims on the merits. Pursuant to 28 U.S.C. §1291, the appellate court had jurisdiction to hear that appeal:

> The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .

Once appellate jurisdiction attaches, the broad powers of determination of the appellate court are framed in 28 U.S.C. §2106:

> The Supreme Court or any court of appellate jurisdiction may affirm, modify, vacate, set aside, or reverse any judgment brought before it for review, and may remand the case and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as are just under the circumstances.

It cannot be said that Rule 4(a)(3) is jurisdictional in nature. "Once appellate court jurisdiction attaches, the power of the court of appeals should be plenary to the extent it chooses to exercise it." *Scott v. University of Delaware,* 601 F.2d 76 (3d Cir. 1979), *cert. denied,* 444 U.S. 931, 100 S. Ct. 275, 62 L. Ed. 2d 189 (1979). *Scott* allowed certain issues to be reviewed on appeal despite a party's

failure to cross appeal. Likewise, in *Rhoades v. Ford Motor Co.*, 14 F.2d 931 (3d Cir. 1975), the plaintiff, who was also a third party defendant, prevailed on his main demand, and subsequently failed to file a protective appeal on a third party judgment rendered against him. Nevertheless, the court reviewed that particular aspect of the judgment stating:

> It is axiomatic that only a party aggrieved by a final judgment may appeal. Therefore, the third party defendant might well have believed that he could not appeal the final judgment. While better practice would have dictated that the plaintiff file a protective cross appeal, under the circumstances we will not allow his failure to file a notice of appeal to preclude all review of the record. In this respect, we follow the rule we recently invoked in a modified context: Once appellate jurisdicton attaches, the power of the court of appeals should be plenary to the extent that it chooses to exercise it. A court should not close its eyes to what is plainly there.

514 F. 2d at 934.

Hysell v. Iowa Public Service Co., 559 F.2d 468 (8th Cir. 1977), further illustrates this point:

> When one party files a notice of appeal, the court acquires jurisdiction to reverse or modify the entire judgment, even as it is applied to nonappealing parties. Once a timely notice of appeal has been filed from the judgment, it gives it jurisdiction to review the entire judgment; rules requiring separate appeals by other parties are rules of practice, which may be waived in the interest of justice when circumstances may require.

559 F.2d at 476.

Moreover, in light of *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S. Ct. 2405, 101 L. Ed. 2d 285 (1988), to be discussed *infra*, the court in *U.S. v. Tabor Court Realty Corp.*, 943 F.2d 335 (3rd Cir. 1991), *cert. denied*, 112 S. Ct. 1167, 117 L. Ed. 2d 413, 60 U.S.L.W. 3542 (1992), held that the holding in *Torres* — that Fed. R. App. P. 3(c) is a mandatory and jurisdictional requirement — was not applicable to Rule 4(a)(3) appeals. *Tabor* reasoned that the *Torres* holding did not apply to Rule 4(a)(3) appeals because the initial notice of appeal invokes jurisdiction over the entire case. This is so because "in order to fully adjudicate the appeal before it, an appellate court will necessarily have the power to overlook the absence of a 4(a)(3) notice and reverse or otherwise modify a nonappealed judgment or ruling." 943 F.2d at 344.

An examination of the appellate rules supports the proposition set forth in *Tabor* that Rule 4(a)(3) is not a jurisdictional rule, but rather a rule of practice. Rule 1 of the Federal Rules of Appellate Procedure defines the scope of the rules, and notes that the "rules govern practice and appeals to the United States Courts of Appeals from the United States District Courts . . ." The rule does not affect jurisdiction:

> These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law.

Fed. R. App. P. 1(b).

The rules may even be suspended:

> In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the

> requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

Fed. R. App. P. 2. (Rule 26(b) prohibits a court of appeals from extending the time for taking appeal or seeking review.)

While several circuits have recognized the principle that Rule 4(a)(1) is seminal to a court's obtaining jurisdiction on appeal, they have properly held that Rule 4(a)(3) operates as a rule of practice, **not** determinative of jurisdictional issues. (*See Scott v. University of Delaware, supra*; *Hysell v. Iowa Public Service Co., supra*; and *Rhoades v. Ford Motor Co., supra*;) This difference is manifested by the different language used in Fed. R. App. P. 4(a)(1) and Fed. R. App. P. 4(a)(3). Fed. R. App. P. 4(a)(1) states that a notice of appeal **shall** be filed within an established time period, while Rule 4(a)(3) provides that once a notice of appeal is filed, any other party **may** file a notice of appeal. (Emphasis added.) Rule 4(a)(3) certainly does not, by its language, mandate the filing of a cross appeal. The foregoing rules ensure that disposition of a case becomes final if no party acts to upset the judgment within a specified period of time. As such, when a case is appealed pursuant to Rule 4(a)(1), the **entire** judgment is in effect revived, notwithstanding the filing of a Rule 4(a)(3) appeal.

The only logical conclusion which can be drawn from the foregoing rules and authorities is that Fed. R. App. P. 4(a)(3) is a rule of practice and not a rule of jurisdiction. To hold otherwise runs contrary to the appellate framework. A rule of practice may be waived in the interest of justice because no jurisdictional bar exists. In this case, jurisdiction attached when the plaintiff filed his initial appeal. This

appeal revived all issues contained in the decision appealed from, notwithstanding the absence of a cross appeal. Accordingly, the court is not precluded from considering a dismissal of Dickson's third party claim, and reversing that dismissal as justice so requires.

IV.

The *Torres* Holding, That Compliance With Federal Rule of Appellate Procedure (3)(c) Is A Jurisdictional Prerequisite, Should Not Be Extended To Rule 4(a)(3) Appeals.

Prior to the Supreme Court's decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S. Ct. 2405, 101 L. Ed. 2d 285 (U.S. 1988), the rule of practice approach for 4(a)(3) appeals was firmly entrenched in the jurisprudence and consistently applied where appropriate. The following cases are typical of this approach. In *Arnold's Hofbrau, Inc. v. George Hyman Construction Co.*, 480 F.2d 1145 (D.C. Cir. 1973), the court held that, despite the fact that only one of the three defendants took an appeal from a judgment, the court had jurisdiction to grant all of the defendants a new trial as to damages. In so holding, the court noted:

> While ordinarily an appellee . . . cannot secure alteration or modification of a judgment unless he has taken his own appeal, this rule does not state a jurisdictional restriction on federal appellate courts but merely constitutes a 'rule of practice.'

480 F.2d at 1150.

In *Tug Raven v. Trexler,* 419 F.2d 536, 548 (4th Cir. 1969), *cert. denied*, 398 U.S. 938, 90 S. Ct. 1843, 26 L. Ed.

2d 271 (1970), the court observed that "the traditional federal 'rule of practice' should not be permitted to subvert the just results which federal appellate courts are obliged to fashion under 28 U.S.C. 2106."

Again, in *United States v. United States Steel Corp.*, 520 F.2d 1043 (5th Cir. 1975), the Fifth Circuit concluded that it was not necessary for the appellee to file a notice of cross appeal in order to review the question of an enlargement of a class action. The court said:

> If we assume, somewhat skeptically, that formal notice of cross appeal is necessary to bring this class action forward, we would hold nonetheless that the circumstances of this case are sufficient to bring the order within the principle that the rules themselves ought not to be allowed to subvert the just result which 28 U.S.C. §2106 obligates every appellate court to reach in cases lawfully brought before it for review.

520 F.2d at 1043.

As these cases point out, the rule of practice approach provides an appropriate analytical tool to determine the necessity of a cross appeal. Rigid application of Rule 4(a)(3) can lead to undesirable results and a subversion of justice. Accordingly, the practice approach must remain intact.

Unfortunately, as of late, some circuits have cast doubt on this approach by incorrectly extending the holding of *Torres* to Rule 4(a)(3) appeals. This interpretation is flawed, necessitating clarification by this high court as to the soundness of the rule of practice approach. The instant case provides an opportunity for the court to dispel uncertainty which has been generated by *Torres* and

restore the rule of practice analysis to 4(a)(3) appeals.

Moreover, this case presents an issue also raised in *Stockstill v. Petty Ray Geophysical*, 888 F.2d 1493 (5th Cir. 1989); *U.S. v. Tabor Court Realty Corp.*, 943 F.2d 335 (3rd. Cir. 1991), *cert. denied*, 112 S. Ct. 1167, 117 L. Ed. 2d 413, 60 U.S.L.W. 3542 (1992); and *Young Radiator Company v. Celotex Corporation*, 881 F.2d 1408 (7th Cir. 1989). Specifically, these cases have considered the effect, if any, of the Supreme Court's ruling in *Torres* on 4(a)(3) appeals. Not surprisingly, a split has occurred in the circuits which have faced this issue.

As a background, the issue in *Torres* was whether a court had jurisdiction over a party not specified in a Fed. R. App. P. 3(c) notice of appeal. Unfortunately, this court utilized broad and sweeping language to determine that Rule 3(c) was mandatory and jurisdictional. Specifically, this court stated that mandatory and jurisdictional requirements are set forth in both Fed. R. of App. P. 3 and 4, in effect, treating these rules *in globo* as a jurisdictional threshold.

Applied literally, this language creates an anomaly in the law. *U.S. v. Tabor Court Realty, Corp., supra*, recognized this anomaly and avoided the unjust consequences by interpreting the Supreme Court's holding on juirisdiction to be limited to those appellate rules to which it logically applies. The *Tabor* court held that *Torres* was not controlling in 4(a)(3) cases because its language did not present any definitive statement as to whether or not a cross appeal is mandatory or jurisdictional. Moreover, *Tabor* found that, although the *Torres* opinion used broad terminology regarding the jurisdictional aspects of Fed. R. App. P. 3 and 4, "neither the language nor the decision goes beyond a clarification of the point at which non-

compliance with the Rule's requirement goes impermissibly beyond that allowed by even a liberal construction of the rules." 943 F.2d at 344. *Tabor's* interpretation of *Torres* is sound. Treating 4(a)(3) as a rule of practice instead of as a jurisdictional requirement insures that justice will be done and parties like Dickson will not be unfairly penalized in the appellate process.

However, *Young Radiator Co. v. Celotex Corp.*, 881 F.2d 1408 (7th Cir. 1989), took the opposite approach to that taken in *U.S. v. Tabor Court Realty Corp.* in the application of *Torres* to cases involving 4(a)(3) appeals. In *Young*, the district court granted defendant's motion for summary judgment, as well as the third party defendant's motion for summary judgment. This judgment was reversed on appeal, and the third party defendant filed a motion to dismiss due to defendant's failure to file a protective appeal.

The *Young* court granted the motion to dismiss after finding that the broad language in *Torres* encompassed Rule 4(a)(3) appeals. In reaching its decision, the court noted that the Third, Fourth, Fifth, Eight, Eleventh, and District of Columbia Circuits have held that Rule 4(a)(3) is a rule of practice, subject to suspension in certain circumstances, while the Second, Sixth, Seventh, and Tenth Circuits have held that Rule 4(a)(3) is a mandatory, jurisdictional requirement. However, *Young* found that even among these four circuits there were cross currents which recognize, in *dicta*, a rule of practice approach. 881 F.2d at 1416.

Dickson submits that *Young* incorrectly interpreted the Supreme Court's decision in *Torres*. However, *Young* is inapposite in that the district court had decided the third party claims on the merits and had granted a motion for

summary judgment on same. In fact, the *Young* court also noted that, even under a rule of practice approach, a waiver of 4(a)(3) would not be warranted because the third party defendant clearly obtained rights under the district court's judgment in their favor on their motion for summary judgment, and those rights could not be disturbed. As mentioned, *supra*, Dickson's rights vis-a-vis A&A were never determined on the merits. Therefore, the district court's judgment of dismissal of A&A was not considered "adverse" to any of the parties. This dismissal was without prejudice.

Finally, not unlike the *Tabor* court, the Fifth Circuit appears reluctant to invoke the harsher rule established in *Young*. This is evident by the recent case of *Stockstill v. Petty Ray Geophysical*, 888 F.2d 1493 (5th Cir. 1989). In *Stockstill*, the plaintiff settled prior to trial, leaving only the determination of certain cross-claims and third party claims. The trial court found no validity to the cross-claims asserted against one of the parties, B&B. Accordingly, the court dismissed the cross-claims and B&B's third party claim. Appeal was taken from the dismissal of the cross-claim, but no appeal was taken from the dismissal of B&B's third party claim. In determining whether the failure to file a notice of appeal was fatal to B&B's third party claims, the court first looked to *Anthony* and *Bryant*, which held that an initial notice of appeal is jurisdictional, but a protective or a cross appeal is permissive. The court went on to state:

> It is questionable whether *Anthony* or *Bryant* remain good law in light of *Torres v. Oakland Scavenger*.

888 F.2d at 1496.

The court then noted "we need not decide today however, whether *Anthony* and *Bryant* survive *Torres*,"

reasoning that the trial court's decision could be read as being "adverse" to the nonappealing party, B&B. Therefore, B&B could not take advantage of the exception enunciated in *Anthony* and *Bryant*.

Unless this Court decides the issue of *Torres'* effect on Rule 4(a)(3) in the present case that issue will no doubt come before this high court again in the near future. Several circuits have grappled with the application of *Torres* to Rule 4(a)(3), and the result has been a split in the circuits, causing uncertainty in the law. Dickson submits that this case presents an appropriate vehicle for resolution of this issue, wherein this Court can firmly establish that the rule of practice is a sound approach for Rule 4(a)(3) appeals. Treatment of Rule 4(a)(3) as a rule of practice instead of as a jurisdictional requirement ensures that justice will be done, and that parties like Dickson will not be unfairly penalized in the appellate process.

CONCLUSION

Dickson presents this Court with an opportunity to dispel the uncertainty regarding the correctness of the application of a rule of practice approach to 4(a)(3) appeals. This issue has created confusion in the jurisprudence as is evident by the circuit split. Until this Court clarifies its holding in *Torres*, parties such as Dickson will be left in quandary as to their rights. Dickson submits that the *Torres* holding must be limited in scope. A rigid jurisdictional approach to 4(a)(3) appeals is inappropriate and will often result in a subversion of justice, as in the present case.

The appellate rules dictate a rule of practice approach for protective cross appeals. Rule 4(a)(3) does not, by its language, mandate the filing of a cross appeal. Moreover, when an initial appeal is filed it operates to revive all issues contained in the judgment, because once

appellate jurisdiction attaches, the power of the court is plenary to the extent that it chooses to exercise it.

Finally, Dickson was not required to file a notice of appeal. The district court rendered judgment in favor of Dickson and against the Plaintiff. The merits of Dickson's third party claim were never considered because they were moot. The jurisprudence dictates that a party need not appeal a decision that could reasonably be read as not being adverse to the nonappealing party. The dismissal of Dickson's third party claim was obtained solely as a result of the jury's verdict on the main demand. Therefore, no appeal by Dickson was warranted.

This court has the opportunity to do substantial justice and to prevent an anomaly in the appellate rules by reversing the order of dismissal of A&A from this action. To unfairly penalize Dickson under the circumstances of this case, while providing a windfall to A&A, is clearly contrary to law and justice. The rule of practice approach as applied to protective cross appeals must be reaffirmed by this Court.

DATED: July 2, 1992

Respectfully submitted,

WALTER W. CHRISTY
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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of July, 1992, I caused to be served a copy of the above and foregoing Petition for Writ of Certiorari by hand delivery upon the following:

William V. Dalferes, Jr.
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New Orleans, Louisiana 70130

CERTIFICATE OF SERVICE (continued)

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APPENDIX A

LEWIS R. CRIST, Director, Division of Insurance, Department of Economic Development, State of Missouri, Acting as a Domiciliary Receiver of Transit Casualty Company in Liquidation.
Plaintiff-Appellant.

v.

DICKSON WELDING, INC., et al.,
Defendants-Appellees.

No. 90-3448.

United States Court of Appeals,
Fifth Circuit.

April 10, 1992.

Receiver for insolvent insurer brought action against insured for additional premiums allegedly earned under two policies, and insured impleaded its broker. The United States District Court for the Eastern District of Louisiana, Martin L.C. Feldman, J., entered judgment in favor of insured, and receiver appealed. The Court of Appeals, Duhe', Circuit Judge, held that: (1) evidence raised fact issue for jury as to whether insured reasonably relied on representations of insurer's agent concerning policy premium adjustments, for purposes of insured's estoppel and apparent agency defenses; (2) failure to instruct jury that broker's agent was also agent for insured was reversible error; and (3) insured's failure to file notice of appeal of dismissal of its third-party claim against its broker precluded further review of that dismissal on appeal.

Reversed and remanded.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before REYNALDO G. GARZA, GARWOOD, and DUHE', Circuit Judges.

DUHE', Circuit Judge:

Plaintiff brought this diversity suit as receiver for an insolvent insurance carrier, Transit Casualty Company, against a Transit insured, Dickson Welding, Inc., for additional premiums allegedly earned under two policies. Dickson Welding denied that more premiums were due asserting several defenses and, alternatively, impleaded its broker, Alexander & Alexander ("A & A"). The jury found Transit barred from recovering additional premiums. The district court entered judgment for Dickson Welding and dismissed all third-party claims. Transit appeals, and A & A moves to dismiss the appeal as to A & A. For the following reasons, we reverse the judgment on the jury verdict and grant A & A's motion.

I. THE CLAIMS, DEFENSES, AND ASSIGNED ERRORS

The Transit policies provide for an advance premium based on estimated exposures and for an adjustment of premium based on actual exposures as determined from an audit after the policy period. Although Dickson Welding willingly paid the advance premiums, it refused to pay additional premiums claimed pursuant to audits. Transit's receiver brought this suit against Dickson Welding for the additional premiums.

The issues on this appeal concern Dickson Welding's defenses. Maddox, an agent working for Dickson

Welding's broker, A & A, allegedly promised Dickson Welding coverage under policies with a fixed premium, not subject to adjustment or audit. Dickson Welding's first defense was reformation: Dickson Welding argued that the policies should be reformed to reflect the flat-rate premiums promised by Maddox and A & A. Reformation was a bench issue, and the court rejected the defense: it would not rewrite the policy to reflect a flat-rate because it found neither mutual mistake nor mistake by one party and fraud by the other.

Dickson Welding asserted three other defenses that went to the jury: equitable estoppel, apparent authority, and in pari delicto. In the estoppel defense, Dickson Welding asserts that it justifiably relied in good faith on some representation of Transit or Transit's agent, Miro and Associates, and that Dickson Welding acted to its detriment because of that reliance. Transit moved for a directed verdict on Dickson Welding's estoppel defense, but the court denied the motion. The apparent authority defense concerns whether Transit is bound by the actions of its "apparent" agent, Miro: Dickson Welding asserts that because it was justified in assuming that Miro had the authority to perform acts to bind Transit, Transit is bound by Miro's acts. The defense of in pari delicto, meaning "of equal fault," bars a plaintiff from recovering damages if his losses are substantially caused by activities which the law forbids him to do.

[1] Transit assigns as errors the denial of its motions for directed verdict, for a judgment notwithstanding the verdict, and for a new trial. Transit also asks us to consider whether the verdict was erroneous and unreasonable.[1] Transit also claims that the jury was improperly in-

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[1] This issue was raised before the district court in a motion for new trial. 6 R. 1442. We do not review verdicts directly. *Coughlin v. Capitol*

structed regarding reasonable reliance, which is an essential element of both the estoppel and apparent authority defenses.

II. THE MOTIONS TO TAKE THE CASE FROM THE JURY

A. Estoppel.

[2] At the close of Transit's evidence against Dickson Welding, Transit moved for a directed verdict on estoppel and waiver, urging that neither could be a defense, apparently because of the lack of evidence of the element of reasonable reliance.[2] The court initially granted the motion for directed verdict, rejecting waiver and finding a dif-

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(footnote 1 continued)
Cement Co., 571 F.2d 290, 297 (5th Cir.1978). Accordingly, we consider this challenge to the verdict as part of the motion for new trial.

[2] After the district court ruled against Dickson Welding on the bench issue of reformation, Dickson Welding's attorney asked whether the ruling encompassed the waiver or estoppel issue. The motion on estoppel was raised in the following exchange:

> THE COURT: Well, to the extent that [estoppel or waiver] may be a jury issue, it seems ... Mr. Christy .!.. that you are moving for a directed verdict on the issue of estoppel.
> MR. CHRISTY: No.
> THE COURT: Mr. de Klerk [Transit's attorney], are you moving for a directed verdict?
> MR. DE KLERK: Yes, Your Honor.
> THE COURT: Now, tell me why.
> MR. DE KLERK: ... [T]he estoppel and the waiver argument is not something that can be used as a defense under the circumstances of this case and bearing in mind the evidence that's been heard.
> THE COURT: ... Did you have something else?
> MR. DE KLERK: Your Honor, I just wanted to mention the concept of reasonable reliance once again.

ferent essential element of estoppel lacking: the good faith of Dickson Welding (through its president, Marcus Dickson). Both the good faith of the party seeking to invoke the doctrine of equitable estoppel and reasonable reliance on the representation are required for application of the defense. *See Wilkinson v. Wilkinson*, 323 So.2d 120, 126 (La.1975); *Westenberger v. Louisiana Dep't of Educ.*, 333 So.2d 264, 271 (La.Ct.App.1976). The trial judge was evidently not impressed with the suggestion that there was no evidence of reasonable reliance in his ruling.

After a recess, the district judge rescinded his ruling in order to consider the evidence in Dickson Welding's cross-claim against A & A. At the close of all the evidence, the court assumed that all motions were renewed and denied Transit's motion for directed verdict on the estoppel question. Transit later moved for a judgment notwithstanding the verdict, reiterating its argument on estoppel and adding an argument on apparent authority.

[3] We review the rulings on the motions for directed verdict and judgment notwithstanding the verdict de novo, under the same standard applied by the district court: under either motion, '[i]f the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict,'' then the motion should be granted,. *Boeing Co. v. Shipman*, 411 F.2d 365, 375 (5th Cir.1969).

[4] As to the defense of estoppel, we agree with the district court that reasonable people could indeed differ on the question of estoppel, particularly the good faith of Dickson Welding (as represented by Mr. Dickson), which was the basis of the court's initial ruling. For example, Maddox of A & A testified that he relied on representations of Miro employees that Transit policies were being sold

with fixed-rate premiums, and Mr. Dickson testified that he relied on Maddox. The jury no doubt resolved the question of Dickson Welding's good faith by assessing Mr. Dickson's demeanor and credibility. Additionally, an expert testified that audits were not mandatory and could be waived, although there was conflicting testimony. Finally, some evidence showed Miro often waived audits notwithstanding standard-form language requiring an audit.

Because reasonable persons could differ regarding Dickson Welding's good faith and the reasonableness of its reliance, the trial court correctly allowed the defense of estoppel to go to the jury.

B. Apparent Authority.

[5] Transit did not move for a directed verdict in its favor on Dickson Welding's defense of apparent authority, but did move for a judgment n.o.v. on that defense. In its motion for judgment n.o.v. and on this appeal, Transit attempts to tie the apparent-authority defense to the estoppel defense, on which it did move for directed verdict: Transit urges that the facts mandate a judgment notwithstanding the verdict whether the issue is "justifiable reliance" for estoppel or "reasonable reliance" for apparent authority.

[6] If a party has not moved for a directed verdict on an issue yet seeks judgment n.o.v. on that issue, our review is extremely limited. *Seidman v. American Airlines,* 923 F.2d 1134, 1138 (5th Cir. 1991); *see also* Fed.R.Civ.P. 50(b).[3] In such cases "our inquiry is restricted to whether

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[3] The Rule in effect at the time of trial provided that "a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict." Fed.R.Civ.P. 50(b) (amended 1991).

there was *any* evidence to support the jury's verdict, irrespective of its sufficiency, or whether plain error was committed which, if not noticed, would result in maifest miscarriage of justice." *Seidman*, 923 F.2d at 1138 (citing *Hinojosa v. City of Terrell, Tex.*, 834 F.2d 1223, 1228 (5th Cir.1988), *cert. denied*, 493 U.S. 822, 110 S.Ct. 80, 107 L.Ed.2d 46 (1989)) (emphasis in original).

[7,8] Apparent authority is a judicially created concept of estoppel which operates in favor of a third party (Dickson Welding) seeking to bind a principal (Transit) for the unauthorized act of an apparent agent (Miro). *See Boulos v. Morrison*, 503 So.2d 1,3 (La.1987). For the doctrine of apparent authority to apply, the principal must first act to manifest to an innocent third party the alleged agent's authority. Second, the third party must *rely reasonably* on the manifested authority of the agent. *Id.* The testimony that audits could be waived and that Miro often waived audits in spite of contractual language requiring audits constitutes evidence that would support a finding that Dickson Welding's or Maddox's reliance on a representation that the audits were waived was reasonable. Accordingly, the motion for directed verdict on the issue of apparent authority was also properly denied.

III. THE JURY CHARGE ERROR

Transit next asserts that the court improperly charged the jury about reasonable reliance, an element of both the estoppel and apparent-authority defenses. Dickson Welding urges that we need not consider this assigned error because the jury may well have based its judgment on the in pari delicto defense. Thus, Dickson Welding argues, because an independent basis for the verdict supports the judgment, we need not consider the errors assigned by Transit with respect to the other two defenses.

A. The Verdict and Scope of Our Review.

> The jury interrogatory did not distinguish among the three defenses, providing simply:
>
> Is Transit barred from recovering additional premiums from Dickson [Welding] even though the insurance policies in question provided for an adjustment of premiums by audit?
>
> YES ✓
>
> NO ___

[9] When two or more claims are submitted to a jury in a single interrogatory, a new trial may be required if one of the claims was submitted erroneously, because " 'there is no way to know that the invalid claim ... was not the sole basis for the verdict.' " *Braun v. Flynt*, 731 F.2d 1205, 1206 (5th Cir.1984) (quoting *United N.Y. & N.J. Sandy Hook Pilot Ass'n v. Halecki*, 358 U.S. 613, 619, 79 S.Ct. 517, 520, 3 L.Ed.2d 541 (1959); *see also Smith v. Southern Airways*, 556 F.2d 1347 (5th Cir.1977) (general verdict cannot stand if one of three alternative theories of recovery is not supported by evidence); *Ratner v. Sioux Natural Gas Corp.*, 770 F.2d 512, 518 (5th Cir.1985) (general verdict possibly resting upon a theory that lacks adequate support in the record must be set aside). Because the trial court did not ask the jury to answer a special interrogatory on each theory of defense, we cannot determine on which defense Dickson Welding succeeded. Accordingly, we must verify that the jury was properly charged as to the apparent-authority and estoppel defenses, because either one might have been the sole basis for the verdict.

B. Preservation of Error and the Standard of Review.

[10] The next questions are whether Transit preserved its right to appeal the jury charge issue by timely objection and, if so, under what standard of review we examine the alleged error. "No party may assign as error ... the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed.R.Civ.P. 51. Because the purpose of this rule is to enable the trial court to correct any error it may have made before the jury begins its deliberations, the objection and grounds generally must be stated after the charge and before the jury retires. *Lang v. Texas & Pac. Ry.*, 624 F.2d 1275, 1279 (5th Cir.1980). In this case, Transit did not object to the charge about reasonable reliance after the jury was charged.

[11] This failure to object may be disregarded, however, if Transit's position has been previously made clear to the court and it is plain that a further objection would have been unavailing. *See Lang*, 624 F.2d at 1279. We believe the exception applies in this case. During the charge conference Transit objected to the estoppel and apparent-authority charges on the basis that Dickson Welding should be bound not only by the reasonable reliance of its president, Marcus Dickson, but also by the reasonable reliance of Dickson Welding's agent, Paul Maddox of A & A.

[12] Objections at the charge conference do not automatically relieve counsel of the duty to object at the close of instructions before the jury retires. *See Little v. Green*, 428 F.2d 1061, 1070 (5th Cir.), *cert. denied*, 400 U.S. 964, 91 S.Ct. 366, 27 L.Ed.2d 384 (1970). Allowing objections agains after counsel has heard the entire charges is an

admirable practice and gives the judge the opportunity to modify his charge in the light of objections informally stated at the charge conference. *Id.* In this case, however, the judge articulated his desire to expedite the taking of objections at the charge conference and intimated that this was the only opportunity counsel would have to object to proposed charges.[4] Under the circumstances, we believe that Transit's position was previously made clear to the court, and it was plain that a further objection would have been unavailing. Accordingly, the assigned error is preserved for review.

[13,14] In evaluating a jury charge we view the instruction as a whole in the context of the entire case. The judge must instruct the jurors fully and correctly on the law applicable to the case, including defensive theories raised by the evidence. *Powell v. Rockwell Int'l Corp.*, 788 F.2d 279, 284 (5th Cir.1986); *see also Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 424-25 (5th Cir.1985).

C. The Charge on Reasonable Reliance.

The court instructed the jury that for Dickson Welding to prevail on its estoppel defense, Dickson

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[4] The Judge opened the charge conference instructing counsel.

> "[I]n the interest of expediting this, I want to take one by one comments and objections or recommended improvements to the Court's intended instructions to the jury ... then I will rule on your special requested charges."

When Crist's attorney asked for rebuttal after hearing other counsel's objections, the Court advised,

Once you pass, you pass. You have had adequate opportunity to tell me what objections you had to the charge. We don't just keep having a round-robin. If I give you more time, then I will have to give everybody else more time. That's the whole purpose of taking your objections up front and your comments and your requested charges.

Welding must establish that it was acting in good faith and justifiably relied on some reprenentation by Transit or Transit's agent, Miro. For the apparent authority defense, the court charged,

> if you find that Dixon [sic] Welding was justified in assuming that Miro had the authority to act for Transit, then you may find that Transit is bound by the acts of Miro.
>
> You are further instructed, however, that Dickson may rely on the acts of Miro only if you find from the evidence that it was reasonable for Dickson to do so. If you find that Dickson's reliance on something that Miro said or did was not reasonable, then Transit cannot be bound by Miro. If Dickson's reliance on something that Miro did or said wasn't reasonable, then Transit can't be bound by something that Miro did.

The charges do not mention Maddox, and he was the liason between Transit's agent (Miro) and Dickson Welding's president, Marcus Dickson. Maddox, an insurance agent working for Dickson Welding's broker, A & A, was the only party with whom Mr. Dickson had any contact, and Mr. Dickson testified that he relied on Maddox. Miro never discussed the policies with Mr. Dickson but only with Maddox.

[15,16] Transit argues that in view of the facts that Maddox was Dickson Welding's agent and that Miro's contact was with Maddox, the court should have charged the jury on A & A's status as Dickson Welding's agent: this way the jury would consider not only the reasonable reliance of Dickson Welding, the more sympathetic insurance customer, but also the reasonableness of the more

sophisticated Maddox, the insurance professional, whom the jury would hold to a higher standard. We agree. As principal, Dickson Welding is charged with constructive knowledge of facts pertinent to transactions by its agent which the agent knew or could have ascertained by reasonable diligence. *See Mayer v. Ford*, 12 So.2d 618 (La.Ct.App.1943); *Bank of La. v. Argonaut Ins. Co.*, 248 So.2d 349, 352 (Ct.App.La.1971) (*citing Culver v. Culver*, 188 La. 716, 178 So. 252 (1937)). The charge given did not make it clear that Maddox was Dickson Welding's agent, such that his knowledge would be imputed to Dickson Welding. The charges as a whole misled the jury because they focused solely on Mr. Dickson's reliance and did not permit the jury to take into account Maddox's knowledge. Because reasonable or justifiable reliance was an essential element of both defenses and because Maddox's awareness of problems with the policy rate was not a consideration under the charges given, the error was not harmless.

We reverse the judgment insofar as it relates to the jury verdict and remand for a new trial.[5]

IV. THE MOTION FOR NEW TRIAL

[17] The issue of reformation, which was ruled on by the judge, has not been appealed. The assigned errors in the ruling on the motion for new trial relate only to jury issues and not to the reformation issue. Ordering a new trial on the jury charge error moots Transit's challenges to the denial of its motion for new trial.

V. ENFORCEMENT OF THE CONTRACT

[17] Finally, Transit urges that the judge's ruling on

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[5] Transit asks us to remand the entire case for a new trial, but the reformation issue was not appealed, so it need not be retried.

reformation of the contract should have been dispositive of the entire case as a matter of law. At the close of all the evidence in Transit's case against Dickson Welding, the court refused to reform the insurance contracts to flat-rate policies; the other three defenses raised by Dickson Welding were thereafter submitted to the jury. According to Transit, however, there was nothing left for the jury to decide once reformation was denied: the district court should have enforced the contract as a matter of law.

But when did Transit ask the district court to so enforce the contract? As to this issue on appeal, Transit is vague about what error of the trial court it wishes us to review. With the exception of the motions discussed above, Transit did not move to take defenses away from the jury upon the court's ruling on reformation. We found no error with the trial judge's rulings on those motions concerning the estoppel and apparent-authority defenses.

As to the defense of in pari delicto, Transit is essentially asking this Court to strike the defense for the first time on appeal. Transit did not move to strike this defense in the district court or move for a directed verdict on the defense. Neither did Transit object to the judge's proposed jury charge on in pari delicto, object to the jury charge as given, or move for a new trial on the issue.[6]

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[6] Counsel's "submit[ting] that pari delicto is not an issue vis-a-vis me" during preliminary discussions at the charge conference does not preserve the error for review as would an objection, particularly in view of counsel's silence when the court thereafter proposed a revised instruction on the defense. The judge might have assumed that the instruction as revised was no longer objectionable. Similarly, the trial judge's hypothetical statement during the charge conference that he "couldn't direct a verdict on that issue" does not create such a motion for directed verdict by Transit, because no such motion was ever offered.

Although counsel was apparently surprised by application of the in pari

"We will consider an issue raised for the first time on appeal only if the issue is purely a legal issue and if consideration is necessary to avoid a miscarriage of justice." *Citizens Nat'l Bank v. Taylor (In re Goff)*, 812 F.2d 931, 933 (5th Cir.1987). In view of our remand for retrial, the issue can be addressed by the trial court, so our consideration of the issue is not necessary to avoid a miscarriage of justice. We note, however, that the ruling on reformation simply determined that the contract would not be rewritten. It did not preclude the possibility of another legal defense applying to the claim under the policy as written.

VI. A & A's MOTION TO DISMISS

[18] A & A moves to dismiss the appeal against it urging that no appeal has been taken from the judgment in its favor. Dickson Welding filed a third-party complaint against A & A seeking recovery for any amount Dickson Welding might be adjudged liable to pay Transit as additional premiums. As to this claim, the judgment provided simply that "all third-party complaints and counter-claims are hereby DISMISSED."

Only Crist (for Transit) filed a notice of appeal, and this appeal was "from the final judgment entered in favor of defendant, Dickson Welding, Inc." The next question we face is whether Dickson Welding's failure to file a notice of appeal of the dismissal of its third-party claim precludes further review of that dismissal.

A & A argues that the judgment dismissing the third-party claim against it is final, because Dickson Welding did not file a protective appeal within the time

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Footnote 6 continued

delicto defense to Transit at the charge conference, ample opportunity to object to the defense at the trial level existed.

limits of Federal Rule of Appellate Procedure, Rule 4(a)(3).[7] Dickson Welding asserts that a Rule 4(a)(3) notice of a cross-appeal or other separate appeal is only a rule of practice which can be suspended and is not jurisdictional, citing *United States v. Tabor Court Realty Corp.*, 943 F.2d 335, 342-43 (3rd Cir.1991), *cert. denied*, ____ U.S. ____, 112 S.Ct. 1167, ____ L.Ed.2d ____ (1992). This Court, too, has noted that appellate courts have the discretionary power to retain all parties on remand in order to do justice. *See Anthony v. Petroleum Helicopters, Inc.*, 693 F.2d 495, 497 (5th Cir.1982).

The continued viability of the principle recognized in *Anthony* is questionable, however, in view of *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988). *See Stockstill v. Petty Ray Geophysical*, 888 F.2d 1492, 1496 (5th Cir.1989) (dicta). The *Stockstill* panel observed that it is doubtful in view of *Torres* that we have jurisdiction to review the district court's dismissal of a third-party defendant, if no notice of appeal was filed as to the dismissal of that third-party claim. *Stockstill*, 888 F.2d at 1497 (dicta).

Like the *Stockstill* panel, we need not decide whether *Torres* changed the law articulated in *Anthony* that we may retain parties necessary to insure an equitable resolution at trial. Even under *Anthony*, the rule was that parties had to file a protective notice of appeal, unless the appealed decision could be read as not adverse to the party who

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[7] Rule 4 provides,

> If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

Fed.R.App.P. 4(a)(3).

failed to appeal. *Stockstill*, 888 F.2d at 1497; *Anthony*, 693 F.2d at 498.[8]

The dismissal of Dickson Welding's third-party claim against A & A was adverse to Dickson Welding. Although Dickson Welding initially had no reason to appeal because it received a favorable judgment as to Transit's claims, Transit's appeal raised the possibility of reversal. Dickson Welding was thereby put on notice that it might be subject to adverse consequences from the dismissal of A & A. *See Anthony*, 693 F.2d at 498; *Stockstill*, 888 F.2d at 1497. Dickson Welding does not fall within the exceptional situation in which the appellate courts have exercised their discretionary powers to retain parties. Dickson Welding should have filed a protective notice of appeal, and A & A's motion is granted.

The judgment of the district court is REVERSED. A & A's motion to dismiss is GRANTED. The case is REMANDED for further proceedings consistent with this opinion.

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[8] *Anthony* recognized two other instances, neither of which applies to this case, in which a party may be retained on remand for equitable reasons:

> when the reversal 'wipes out all basis for recovery against the nonappealing, as well as against the appealing defendant[;]' *Daniels v. Gilbreath*, 668 F.2d 477 (10th Cir. 1982); *Kicklighter v. Nails by Jannee, Inc.*, 616 F.2d 734, 742-45 (5th Cir.1980); [and] when the failure to reverse with respect to the nonappealing party will frustrate the execution of the judgment in favor of the successful appellant.

Anthony, 693 F.2d at 497-98.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-3448

FILED
MAY 11 1992

LEWIS R. CRIST, Director, Division of Insurance, Department of Economic Development, State of Missouri, Acting as a Domiciliary Receiver of Transit Casualty Company in Liquidation.
Plaintiff-Appellant.

versus

DICKSON WELDING, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

(May 11, 1992)

Before GARZA, GARWOOD, DUHE', Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby *denied.*

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

/s/ John M. Duhe', Jr.
UNITED STATES CIRCUIT JUDGE

APPENDIX B

Fed. R. App. P. 2. Scope of Rules.

(a) Scope of Rules. These rules govern procedure and appeals to United States Courts of Appeals for the United States District Courts and the United States Tax Courts; in appeals from bankruptcy appellate panels; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give. When these rules provide for the making of a motion or application in the district court, the procedure for making such motion or application shall be in accordance with the practice of the district court.

(b) Rules Not to Affect Jurisdiction. These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law.

Fed. R. App. P. 3(c)

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

Fed. R. App. P. 4. Appeal as of Right - When Taken.

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by

law as right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If the notice of appeal is mistakenly filed in the court of appeals, the clerk of court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

Fed. R. App. P. 4(a)(3).

If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within fourteen days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

28 U.S.C. §1291. Final Decisions of District Courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in Section 1292(c) and (d) and 1295 of this title.

28 U.S.C. §2106. Determination.

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.